



## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

#### 42 CFR Part 433

[CMS-9912-N]

RIN 0938-AU35

### **Medicaid Program; Temporary Increase in Federal Medical Assistance Percentage (FMAP) in Response to the COVID-19 Public Health Emergency (PHE); Reopening of Public Comment Period**

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS).

**ACTION:** Interim final rule; reopening of public comment period.

**SUMMARY:** On November 6, 2020, CMS published an interim final rule with request for comments (IFR) entitled “Additional Policy and Regulatory Revisions in Response to the COVID–19 Public Health Emergency.” The IFR set forth certain requirements in CMS regulations that States must follow in order to claim a temporary increase in Federal matching funds for their Medicaid programs under the Families First Coronavirus Response Act (FFCRA). In light of the possibility of changed circumstances since publication of the IFR and other policy considerations, CMS is considering modifying those requirements. CMS is soliciting additional information from the public on any issues that may be pertinent to these potential modifications by reopening the public comment period for an additional 30 days.

**DATES:** The comment period for the amendments to 42 CFR 433.400 in the interim final rule published at 85 FR 71142 on November 6, 2020, is reopened. To be assured consideration, comments must be received at one of the addresses provided below, by [Insert date 30 days after date of filing for public inspection at the **Federal Register**]. (See the **SUPPLEMENTARY INFORMATION** section of this document for a list of the provisions open for comment.)

**ADDRESSES:** In commenting, refer to file code CMS-9912-N.

Comments, including mass comment submissions, must be submitted in one of the following three ways (please choose only one of the ways listed):

1. Electronically. You may submit electronic comments on this regulation to <https://www.regulations.gov>. Follow the "Submit a comment" instructions.
2. By regular mail. You may mail written comments to the following address ONLY:  
Centers for Medicare & Medicaid Services,  
Department of Health and Human Services,  
Attention: CMS-9912-N,  
P.O. Box 8016,  
Baltimore, MD 21244-8016.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. By express or overnight mail. You may send written comments to the following address ONLY:

Centers for Medicare & Medicaid Services,  
Department of Health and Human Services,  
Attention: CMS-9912-N,  
Mail Stop C4-26-05,  
7500 Security Boulevard,  
Baltimore, MD 21244-1850.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

**FOR FURTHER INFORMATION CONTACT:** Stephanie Bell, (410) 786-0617.

**SUPPLEMENTARY INFORMATION:**

Provisions open for comment: We will consider comments that are submitted as

indicated above in the **DATES** and **ADDRESSES** sections on 42 CFR 433.400.

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: <https://www.regulations.gov>. Follow the search instructions on that Web site to view public comments. CMS will not post on Regulations.gov public comments that make threats to individuals or institutions or suggest that the individual will take actions to harm the individual. CMS continues to encourage individuals not to submit duplicative comments. We will post acceptable comments from multiple unique commenters even if the content is identical or nearly identical to other comments.

## **I. Background**

The Families First Coronavirus Response Act (FFCRA) was enacted on March 18, 2020 (Pub. L. 116-127). Included among its provisions is section 6008, which provides a temporary 6.2 percentage point increase to each qualifying State and territory's Federal Medical Assistance Percentage (FMAP) ("temporary FMAP increase") under section 1905(b) of the Social Security Act (the Act). States must meet certain conditions in order to receive the temporary FMAP increase. Specifically, as relevant to this notice, under section 6008(b)(3) of the FFCRA, States must provide that an individual who is enrolled for benefits under the Medicaid State plan (or waiver of that plan) as of March 18, 2020, or enrolls for benefits under such plan (or waiver) during the period beginning March 18, 2020, and ending the last day of the month in which the COVID-19 public health emergency (PHE) period ends, shall be treated as eligible for such benefits through the end of the month in which such emergency period ends unless the individual requests a voluntary termination of eligibility or the individual ceases to be a resident of the State.

Initially, CMS issued guidance informing States how to comply with section 6008(b)(3)

of the FFCRA through Frequently Asked Questions (FAQs) documents posted on Medicaid.gov on April 13, 2020; May 5, 2020; and June 30, 2020.<sup>1</sup> As described more fully in those FAQs, under CMS’ initial interpretation of section 6008(b)(3) of the FFCRA, to receive the temporary FMAP increase, a State was required to keep beneficiaries enrolled in Medicaid, if they were enrolled on or after March 18, 2020, with the same amount, duration, and scope of benefits, through the end of the month in which the COVID–19 PHE ends. Additionally, States could not subject these beneficiaries to any increase in cost sharing or beneficiary liability for institutional services or other long-term services and supports during this time period.

On November 6, 2020, CMS issued an interim final rule with a request for comments entitled, “Additional Policy and Regulatory Revisions in Response to the COVID–19 Public Health Emergency,” that, among other things, added to 42 CFR part 433 a new subpart G, Temporary FMAP Increase During the Public Health Emergency for COVID–19, which included a newly established § 433.400 (85 FR 71142, 71144, 71160 through 71167, 71197 and 71198). In § 433.400, CMS set forth a different approach to implementing section 6008(b)(3) of the FFCRA (85 FR 71144). In the preamble, CMS explained that section 6008(b)(3) of the FFCRA is ambiguous and that States had expressed concern that CMS’ interpretation of section 6008(b)(3) of the FFCRA in the FAQs made it challenging for them to manage their Medicaid programs effectively (85 FR 71161). Specifically, the States noted that CMS’ initial interpretation severely limited State flexibility to control program costs in the face of growing budgetary constraints and developing fiscal challenges during the COVID–19 PHE. States argued that this frustrated one purpose of section 6008 of the FFCRA—to provide additional support to State Medicaid programs in their response to the COVID–19 pandemic. Under the IFR’s approach to implementing section 6008(b)(3) of the FFCRA, States were still required, as a condition for receiving their temporary FMAP increases, to maintain beneficiary enrollment in

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<sup>1</sup> The April 13, 2020 and June 30, 2020 FAQs were incorporated into one comprehensive FAQs document on May 5, 2020, and last updated on January 6, 2021. Available at <https://www.medicaid.gov/state-resource-center/Downloads/covid-19-faqs.pdf>.

Medicaid, but they were also permitted to make certain changes to the amount, duration, and scope of benefits and to beneficiary cost-sharing, subject to certain beneficiary protections set forth in the IFR (85 FR 71144, 71162 through 71167). The approach taken in the IFR represented an attempt by CMS, based on the information before the agency at the time the IFR was issued, to balance the interests of States, health care providers, and beneficiaries.

## **II. Changed Circumstances**

Since issuing the IFR, CMS has become aware that the IFR's implementation of section 6008(b)(3) of the FFCRA has negatively affected some Medicaid beneficiaries. During the IFR's comment period, CMS received a number of comments opposing the approach taken in the IFR and requesting that CMS instead choose to adopt its original interpretation of section 6008(b)(3) of the FFCRA. Some commenters expressed specific concern about the potential loss of Medicaid benefits that could be experienced by beneficiaries transitioned from an eligibility group providing full coverage to a Medicare Savings Program eligibility group, which provides coverage for Medicare premiums and cost sharing alone. Most recently, Medicaid beneficiaries who claim they were harmed when their States changed their Medicaid coverage following the issuance of § 433.400 have sued CMS, seeking to invalidate the IFR. As CMS explained in the IFR, CMS' original interpretation provided the strongest protections for beneficiaries and their access to medically necessary services during the COVID-19 pandemic. CMS is also cognizant that the COVID-19 PHE remains ongoing.

Additionally, CMS understands that the fiscal situations of many States may have changed since the IFR was issued in November 2020. *See, for example*, American Rescue Plan Act of 2021 section 9901, 42 U.S.C. 802 (appropriating hundreds of billions of dollars to “mak[e] payments to States, territories, and Tribal governments to mitigate the fiscal effects stemming from the [COVID-19 PHE]”). This funding may have mitigated the concerns that States had raised with CMS and that CMS had considered in issuing the IFR. Accordingly, some of the reasons underlying the approach taken in the IFR may no longer apply.

Given these potentially changed circumstances, CMS is now considering a different approach in its final rule. Specifically, CMS is considering returning to its original interpretation of section 6008(b)(3) of the FFCRA described in the FAQs from April 13, 2020, May 5, 2020, and June 30, 2020. Under this proposed interpretation, to be eligible for the temporary FMAP increase, a State would be required to keep its beneficiaries enrolled in Medicaid, if they were enrolled as of, on, or after March 18, 2020, and would not be permitted to reduce the amount, duration, or scope of their benefits or modify their cost sharing after the effective date of the final rule. We believe this interpretation and the approach taken in the IFR are both reasonable approaches to implementing section 6008(b)(3) of the FFCRA. However, CMS plans to review the IFR to determine if consideration of the comments we received and changed circumstances warrant adopting the original interpretation of section 6008(b)(3) of the FFCRA in its final rulemaking.

Consequently, CMS is considering whether (1) § 433.400 should be rescinded, and (2) CMS should replace that provision with a final rule that implements its original interpretation of section 6008(b)(3) of the FFCRA. Additionally, if CMS chooses to take these steps, it may require States to offer Medicaid beneficiaries whose coverage was changed in a manner consistent with § 433.400 an opportunity to re-enroll in, or to have their enrollment changed back to, their prior coverage. Any re-enrollment in or change back to prior coverage would become effective beginning on the final rule's effective date. CMS is re-opening the comment period on the IFR entitled, "Additional Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency," to give the public an opportunity to comment on any issues that may be pertinent to these considerations.

### **III. Collection of Information Requirements**

This document does not impose information collection requirements, that is, reporting, recordkeeping, or third-party disclosure requirements. Consequently, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of

1995 (44 U.S.C. 3501 et seq.).

#### **IV. Response to Comments**

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

Chiquita Brooks-LaSure, Administrator of the Centers for Medicare & Medicaid Services, approved this document on September 22, 2022.

Dated: September 23, 2022.

**Xavier Becerra,**

Secretary,

Department of Health and Human Services.